United States Department of Labor
Employees' Compensation Appeals Board

R.K., Appellant	)	
	)	**Docket No. 11-359**
and	)	**Issued: November 21, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2010 appellant filed a timely appeal from a July 26, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which granted him a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than four percent permanent impairment of the right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On January 28, 2008 appellant, then a 51-year-old sales/service distribution associate, filed a Form CA-2, notice of occupational disease, for elbow tendinitis due to performing work duties which included pushing, pulling and turning heavy equipment. OWCP accepted right

[1] 5 U.S.C. §§ 8101-8193.

lateral epicondylitis and sprain of the right shoulder and upper arm. Appellant stopped work on January 11, 2008 and did not return.

A January 23, 2008 magnetic resonance imaging (MRI) scan of the right elbow revealed small right elbow joint effusion, mild distal triceps tendon strain, minimal distal biceps tendinosis without a tear and common extensor tendinosis with an intrasubstance partial tear. A March 10, 2008 MRI scan of the right elbow revealed minimal joint effusion with subchondral cyst at the capitellum, mild triceps tendon strain, common extensor tendinosis with partial thickness tear and minimal tendinopathy involving the common flexor origin. Appellant came under the treatment of Dr. Ira C. Sachs, an osteopath, from June 10 to October 7, 2008, for an onset of right elbow pain which began after lifting at work. Dr. Sachs advised that appellant was treated conservatively with physical therapy and corticosteroid injections without relief in his symptoms. He diagnosed right lateral epicondylitis and ruled out radial nerve syndrome and recommended surgery which OWCP authorized. On November 10, 2008 Dr. Sachs performed a right lateral epicondyle release and lateral epicondylectomy and diagnosed right lateral epicondylitis.

On October 23, 2009 appellant filed a claim for a schedule award.

On December 1, 2009 OWCP requested that appellant submit a report from a physician addressing whether he sustained permanent impairment to the right arm due to work factors pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*).

Appellant submitted an August 25, 2009 report from Dr. David Weiss, an osteopath, who noted that appellant reached maximum medical improvement on August 25, 2009. Dr. Weiss noted that appellant had discomfort and stiffness of the right elbow which was daily and constant in nature. He noted that appellant denied any difficulty in completing activities of daily living including performing household chores, self-care, sleeping, performing overhead reaching, lifting or nonspecialized hand activities. Examination of the right elbow revealed a well-healed surgical scar over the lateral aspect with no tenderness over the lateral epicondyle, lateral extensor mechanism, medial epicondyle, medial flexor mass and distal triceps. Range of motion for flexion was 145/145 degrees, pronation was 80/80 degrees and supination was 70/80 degrees. Manual muscle strength testing was normal and some atrophy was noted. Dr. Weiss opined that the work-related injury was the competent producing factor for appellant's subjective and objective findings. He noted reviewing both the MRI scans of the right elbow dated January 23 and March 10, 2008. Dr. Weiss noted that appellant had five percent impairment to the right arm pursuant to the A.M.A., *Guides.* Utilizing Table 15-4 on page 399 of the A.M.A., *Guides,* he found that appellant had a class 1 impairment due to lateral epicondylitis with surgical release of the flexor or extensor with residual symptoms, which provided a default value of a five percent right arm impairment. Dr. Weiss noted grade modifiers for functional history of zero,[3] physical examination of one for atrophy[4] and clinical studies of two based on review of MRI scan

[2] A.M.A., *Guides* (6th ed. 2008).

[3] *Id.* at 406, Table 15-7.

[4] *Id.* at 408, Table 15-8.

studies.[5] Using the net adjustment formula,[6] he determined that there was no adjustment from the default grade. Dr. Weiss concluded that appellant had five percent right arm impairment.

OWCP referred Dr. Weiss' report to OWCP's medical adviser. In a January 21, 2010 report, Dr. Weiss found that appellant had four percent impairment of the right arm pursuant to the A.M.A., *Guides*. The medical adviser concurred with Dr. Weiss that, pursuant to Table 15-4, page 399 of the A.M.A., *Guides*, appellant had a class 1 impairment due to lateral epicondylitis with surgical release of the flexor or extensor with residual symptoms, with a default value of a five percent right arm impairment. He noted that Dr. Weiss properly found a grade modifier for functional history of zero, and for physical examination of one for atrophy. However, the medical adviser differed with regard to Dr. Weiss' determination of a grade modifier for clinical studies of two, noting MRI scan findings showed "mild" pathology which would correlate with a grade one modifier pursuant to Table 15-9, page 410-11 of the A.M.A., *Guides*. He noted that Dr. Weiss found a grade two modifier for clinical studies but that the A.M.A., *Guides* indicate that a grade two modifier is for a moderate problem. As clinical study only supported a mild pathology, a grade one modifier for clinical studies was more appropriate. Using the net adjustment formula, the medical adviser determined that the net adjustment factor was -1 which moved the default grade C value to grade B value for which four percent arm impairment is provided.

In a decision dated February 1, 2010, OWCP granted appellant a schedule award for four percent permanent impairment to the right upper extremity. The period of the award was from August 25 to November 20, 2009. On February 4, 2010 appellant requested a telephone hearing which was held on May 10, 2010.

In a decision dated July 26, 2010, the hearing representative affirmed the decision dated February 1, 2010.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the

[5] *Id.* at 410, Table 15-9.

[6] *Id.* at 411.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.[9] Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6th ed. 2008).[10]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

Appellant's claim was accepted by OWCP for right lateral epicondylitis and sprain of the right shoulder and upper arm and authorized a surgical release which was performed on November 10, 2008.

In an August 25, 2009 report, Dr. Weiss opined that appellant had five percent impairment of the right arm pursuant to the A.M.A., *Guides* due to his right epicondylitis and surgical release. For elbow epicondylitis, he referred to Table 15-4, which specifically addresses lateral epicondylitis status postsurgical release and provides a default arm impairment of five percent for class 1 CDX.[12] This may be adjusted using the established formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] In this case, Dr. Weiss identified grade modifier of 2 (moderate problems) for clinical studies, a grade modifier of 0 for functional history and a grade modifier of one for physical examination. Applying the formula resulted in zero net adjustment or five percent upper extremity impairment. Dr. Weiss referenced both MRI scans of the right elbow, performed on January 23 and March 10, 2008, which revealed mild distal triceps tendon strain and extensor tendinosis with intrasubstance partial tear/tendon fiber splitting, which he correlated with a grade two modifier for clinical studies.

OWCP requested that its medical adviser review the medical record and determine the extent of any permanent impairment of the right arm. In his January 21, 2010 report, OWCP's medical adviser reviewed the evidence and applied the sixth edition of the A.M.A., *Guides* to Dr. Weiss' clinical findings. He concurred with Dr. Weiss in identifying a class 1 impairment due to lateral epicondylitis status postsurgical release using the elbow regional grid set forth in Table 15-4, which yielded a default value of five percent arm impairment. The medical adviser considered the applicable grade adjustments for GMFH, GMPE and GMCS. He found a grade modifier of 0 for functional history, 1 for physical examination and 1 for clinical studies. Utilizing the net adjustment formula, the medical adviser determined that the net adjustment

[9] *See id*.; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

[11] A.M.A., *Guides* 494-531.

[12] *Id.* at 399, Table 15-4.

[13] *Id.* at 411.

factor was -1 which supported a grade B rating value for which four percent arm impairment is provided. He explained that the grade two modifier for clinical studies noted by Dr. Weiss, for moderate pathology, did not properly reflect the clinical studies which showed only "mild" pathology.

The Board has held that the opinion of an examining physician in the appropriate field of medicine may take precedence over the opinion of an OWCP medical adviser when considering factors from physical examination.[14] Dr. Weiss examined appellant and reviewed the same MRI scan findings as the OWCP medical adviser. Based on this, he determined that clinical studies supported moderate pathology and determined, under the A.M.A., *Guides*, that appellant had five percent right arm impairment. Dr. Weiss noted appellant's MRI scan studies documented a mild triceps tendon strain but also revealed extensor tendinosis with a partial thickness tear. The Board finds that Dr. Weiss properly determined that appellant's clinical studies merited a grade two modifier instead of a grade one modifier. OWCP's medical adviser, in disagreeing with Dr. Weiss, did not fully explain why the MRI scan studies only supported mild pathology. Consequently, the Board finds that the opinion of Dr. Weiss is sufficiently reasoned, comports with the A.M.A., *Guides*, and establishes that appellant has five percent permanent impairment of the right arm.

The Board will modify OWCP's July 26, 2010 decision to find that appellant has five percent permanent impairment of the right upper extremity. Upon return of the case record, appellant is entitled to an additional one percent impairment of the right upper extremity.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has five percent impairment of his right upper extremity.

[14] *Michelle L. Collins*, 56 ECAB 552 (2005).

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2010 decision of the Office of Workers' Compensation Programs be affirmed, as modified.

Issued: November 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board